Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

JEFFREY W. BADER,

Petitioner,

v.

LLOYD BLANKFEIN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In a stockholder's derivative action under § 14(a) of the Securities Exchange Act, where the exceptions to the pre-suit demand rule are governed by the law of the state of incorporation, did the Second Circuit blatantly nullify state law by holding that the business judgment rule protects the disclosure of false information in a proxy statement?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Second Circuit.

The Petitioner here and appellant below is Jeffrey W. Bader.

The Respondents here and appellees below are Lloyd C. Blankfein, Gary Cohn, Jon Winkelried, John Browne, John H. Bryan, Claes Dahlbäck, Stephen Friedman, William W. George, Rajat K. Gupta, James A. Johnson, Lois D. Juliber, Edward M. Liddy, Ruth J. Simmons, John S. Weinberg, Christopher A. Cole, J. Michael Evans, Edward C. Forst, Richard A. Friedman, Richard J. Gnodde, Kevin W. Kennedy, Peter S. Kraus, Masanori Mochida, Thomas K. Montag, John F.W. Rogers, Eric S. Schwartz, Michael S. Sherwood, David M. Solomon, David A. Viniar, Gregory K. Palm, Esta E. Stecher, Alan M. Cohen, and The Goldman Sachs Group, Inc.

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Jeffrey W. Bader petitions the Supreme Court of the United States for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is not reported, but is available at, 2009 WL 4822818 and 2009 U.S. LEXIS 27082, and is reprinted at Pet. App. 1a. The opinion of the United States District Court for the Eastern District of New York dismissing the complaint is also not reported, but is available at 2008 WL 5274442 and 2008 U.S. Dist. LEXIS 102698, and is reprinted at Pet. App. 7a.

STATEMENT OF JURISDICTION

The Court of Appeals for the Second Circuit entered a Summary Order on December 14, 2009 and affirmed the District Court's dismissal of the complaint. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES, RULES, AND REGULATIONS INVOLVED

The claims herein arise under § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) and provides, in pertinent part:

> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of

> any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12.

The claims herein also arise under United States Securities and Exchange Commission ("SEC") Rule 14a-9, 17 C.F.R.§ 240.14a-9; Schedule 14A, 17 C.F.R. § 240.14a-101, and Item 402 of Reg. S-K, 17 C.F.R. § 229.402, and under the laws of the several states including, particularly, the State of Delaware. These provisions are lengthy and are reprinted in the Pet. App. 31a.

STATEMENT OF THE CASE

The court of first instance, the United States District Court for the Eastern District of New York, had jurisdiction of this matter pursuant to 15 U.S.C. § 78aa and 28 U.S.C. § 1367.

This case concerns a defective proxy statement for the March 27, 2007 annual meeting (the "2007 Proxy Statement") of stockholders of defendant The Goldman Sachs Group, Inc., a Delaware corporation ("Goldman Sachs" or the "Company"). For that annual meeting, their directors, who are defendants at bar, solicited the

stockholders' approval for, *inter alia*, their re-election to the board of directors. SEC regulations then in effect required that, when such an election was on the agenda, the proxy statement must contain representations about the compensation paid to directors and executive officers of the Company for the fiscal year (Pet. App. 31a), including either the hypothetical future value or grant date present value of stock options granted to the "named executive officers."[1] (Pet. App. 33a.) The regulations further provided that, if the proxy statement disclosed the present value on the grant date, that value must be calculated under "any option pricing model." (Pet. App. 33a.) The new SEC regulations no longer allow the representation of the hypothetical future value and instead require disclosure of the grant date fair value in accordance with an option pricing model that takes into account the time value of money and the substantive characteristics of the option such as the volatility of the underlying stock, the dividends if any, and the time of expiration of the option.

The 2007 Proxy Statement represented that the calculation of the grant date present value of options granted to the named executive officers was calculated using the Black-Scholes option pricing model. But the represented value was materially false, in contravention of Rule 14a-9 (Pet. App. at 34a): the actual value was materially higher than represented.

The defendants have conceded that they derived the grant date value by taking a discount. ("Goldman Sachs

[1] The "named executive officers" included defendants Lloyd C. Blankfein, Gary D. Gohn, Jon Winkelried, David A. Viniar and John S. Weinberg.

. . . applied certain discounts to the options valuations." Defs.' App. Br. at 39-40). But the 2007 Proxy Statement omitted to disclose that discount. This omission contravened Instruction 9 of Item 402(c) of Regulation S-K, 17 C.F.R. § 229.402(c), which provides that this discount be disclosed in a footnote to the Options Granted Table in the proxy statement. (Pet. App. at 34a.) By contrast, the 2006 Proxy Statement reported that a discount was taken. Accordingly, a reasonable Goldman Sachs stockholder would have understood that no discount was taken in the 2007 Proxy Statement.

Because this is a stockholder's derivative action on behalf of a Delaware corporation, the complaint alleges that pre-suit demand is excused because the misrepresentation of the stock option values is not protected by Delaware's business judgment rule. The District Court concluded that a false statement by directors was not protected by the business judgment rule (Pet. App. 20a), but went on to hold that directors nevertheless could exercise business judgment to decide whether to bring the case and, therefore, demand was required. (Pet. App. 20a-21a.) The Second Circuit inverted the reasoning of the District Court and held that if the disclosure was not protected by the business judgment rule, demand would be excused. (Pet. App. 5a.) But the Second Circuit held that because the disclosure at bar required "thought," the disclosure was protected by the business judgment rule. This is exactly the opposite of Delaware law. (Pet. App. 5a.)

REASONS FOR GRANTING THE PETITION

The Court of Appeals Blatantly Nullified Delaware Law.

The Second Circuit's reading of Delaware law amounts to a "blatant federal-court nullification of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996), because its determination of Delaware law in this case is "plainly wrong." *Id.* at 145. Every Delaware court that has considered the point has held that disclosure is not protected by the business judgment rule. All courts have the duty to construe Delaware corporate law correctly because of the predominance of Delaware corporations and because other states look to Delaware law in formulating their own rules of corporation law. *See, e.g.*, *Nevada Classified School Employees Ass'n v. Quaglia*, 177 P.3d 509, 511 (Nev. 2008); *In re PSE&G Shareholder Litig.*, 801 A.2d 295, 307 (N.J. 2002).

The Court of Appeals nullified Delaware case law regarding whether the business judgment rule protects decisions concerning corporate disclosure. The leading case is *In re Anderson, Clayton Shareholders' Litigation*, 519 A.2d 669 (Del. Ch. 1986). Although not a case from the highest court in Delaware, it is widely followed, as shown below.

In *In re Anderson, Clayton Shareholders' Litigation*, the Chancery Court held that the "weighty presumption" of the business judgment rule does not protect boards when they make disclosures to stockholders. *Id.* at 675. The court held that such a disclosure decision "is not a decision concerning the

management of business." *Id.* at 675. The *Anderson Clayton* court also held that the quality of disclosure is something that courts can adjudicate, but the wisdom of a business decision ordinarily is not:

> The quality of disclosure is inherently something that the court itself must ultimately evaluate. It would be surprising, for example, to find a case in which a plaintiff has demonstrated to a court's satisfaction that a truly important piece of information, within the knowledge of the board, had not been disclosed, but the court nevertheless denied an application for a preliminary injunction on the basis that while the Court found the information highly material, reasonable men could differ on the subject and the board's decision not to disclose, having been made in good faith, should be deferred to. I doubt that that is the law.

Id. at 675. There is no reason for a court to defer to a board's decision to omit a disclosure on the theory that reasonable people could differ about whether to disclose it. *Id.* at 675.

Therefore, the Circuit Court's holding that disclosure "affords the directors an opportunity to exercise their reasonable business judgment" is in direct conflict with Delaware law. (Pet. App. 5a (internal citations omitted.)) Disclosure is not is not a matter of business judgment because the decision regarding disclosure is not part of business management. *See, e.g., In re Anderson, Clayton Shareholders' Litigation*, 519

A.2d at 675 (". . . [T]he question whether shareholders' have, under the circumstances, been provided with appropriate information upon which an informed choice on a matter of fundamental corporate importance may be made, is not a decision concerning the management of business and affairs of the enterprise."); *Lewis v. Leaseway Transp. Corp.*, 1990 WL 67383, at *6 (Del. Ch. May 16, 1990) (". . . [T]he business judgment rule has no applicability to the question whether shareholders have been provided with appropriate information to make an informed choice because the underlying duty (candor) does not concern the management of business and the affairs of the corporation."); *In re Mobile Communications Corp.*, 1989 WL 997182, at *5 (Del. Ch. Apr. 3, 1989) ("independence (or good faith or due care) of a board is not directly relevant to a determination whether a disclosure obligation has been satisfied (disclosure not being a question of business judgment."). The Circuit Court's statement that the board's actions:

> could not have been done automatically or without thought. Rather, determining which figure to disclose and which pricing model to apply required discretion and an exercise of business judgment.

is unsupported by any Delaware case. (Pet. App. at 5a.)

Other courts have more accurately interpreted the Delaware demand policy. In *In re Tri-Star Pictures, Inc. Litigation*, 1990 WL 82734 at *8 (Del. Ch. Jun. 14, 1990),

then Vice Chancellor Jacobs[2] held that applying the demand requirement to a stockholder's derivative action based on a false proxy statement would be inconsistent with Delaware case law that the business judgment rule does not apply to false disclosures and omissions in a proxy statement.[3] Judge Duffy in *Katz v. Pels*, 774 F.Supp. 121, 127 n.5 (S.D.N.Y. 1991), cited *Tri-Star* to hold that ". . . false Proxy claims are not subject to the demand requirement of Delaware Chancery Court Rule 23.1."

It is important to have a consistent application of Delaware law in the federal courts. This court held in *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 106 (1991), that *Burks v. Lasker*, 441 U.S. 471 (1979), "counsels against establishing *competing* federal- and state-law principles on the allocation of managerial prerogatives within the corporation." *Kamen*, 500 U.S. at 106 (emphasis added). *Burks* also held that "[i]t is true that in certain areas we have held that federal statutes authorize the federal courts to fashion a complete body of federal law. Corporation law, however, is not such an area." *Burks*, 441 U.S. at 477 (internal citations omitted). Even if the claim is based on federal law, the law governing the demand requirement must

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[2] Now Associate Justice Jacobs of the Delaware Supreme Court.

[3] "[T]he entire question of demand futility is inextricably bound to issues of business judgment and the standards of that doctrine's applicability." *Siegman v. Tri-Star Pictures, Inc.*, 1989 WL 48746, at *10 (Del. Ch. May 5, 1989) (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)).

be the law of the state of incorporation. *See Kamen v. Kemper Financial Services, Inc.*, 500 U.S. at 106.

The correct interpretation of Delaware corporation law is especially important because various courts look to the Delaware courts for guidance on the subject. *See, e.g., RSL Communications PLC v. Bildirici*, 649 F. Supp. 2d 184, 206 (S.D.N.Y. 2009); *In re Ivan F. Boesky Securities Litig.*, 129 F.R.D. 89, 97 (S.D.N.Y. 1990) ("Delaware has long been recognized as the fountainhead of American corporations and that its Courts of Chancery are known for their expert exposition of corporate law."). This court should not allow the Second Circuit to depart so far from the widely accepted body of Delaware corporate law.

CONCLUSION

For the reasons expressed above, this court should grant the petition for writ of certiorari.

Respectfully submitted,

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March 15, 2010

APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED DECEMBER 14, 2009

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

No. 09-0309-cv

JEFFREY W. BADER,

Plaintiff-Appellant,

v.

LLOYD C. BLANKFEIN, GARY COHN, JON WINKELRIED, JOHN BROWNE, JOHN H. BRYAN, CLAES DAHLBACK, STEPHEN FRIEDMAN, WILLIAM W. GEORGE, RAJAT K. GUPTA, JAMES A. JOHNSON, LOIS D. JULIBER, EDWARD M. LIDDY, RUTH J. SIMMONS, JOHN S. WEINBERG, CHRISTOPHER A. COLE, J. MICHAEL EVANS, EDWARD C. FORST, RICHARD A. FRIEDMAN, RICHARD J. GNODDE, KEVIN W. KENNEDY, PETER S. KRAUS, MASANORI MOCHIDA, THOMAS K. MONTAG, JOHN F.W. ROGERS, ERIC S. SCHWARTZ, MICHAEL S. SHERWOOD, DAVID M. SOLOMON, DAVID A. VINIAR, GREGORY K. PALM, ESTA E. STECHER, ALAN M. COHEN,

Defendants-Appellees,

THE GOLDMAN SACHS GROUP, INC.,

Nominal-Defendant-Appellee.

Dec. 14, 2009

Appendix A

Present JOSÉ A. CABRANES, DEBRA ANN LIVINGSTON, Circuit Judges, and EDWARD R. KORMAN, District Judge.*

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be **AFFIRMED.**

Plaintiff-appellant Jeffrey W. Bader appeals from an order dismissing his stockholder's derivative action, on behalf of nominal-defendant the Goldman Sachs Group, Inc. ("Goldman Sachs"), a Delaware corporation, against defendants-appellees, the directors of Goldman Sachs, based on a proxy statement that allegedly omitted disclosures that the SEC required and contained materially false statements and omissions. Plaintiff's action arises under section 14(a) of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78n(a), and the regulations of the United States Securities and Exchange Commission ("SEC"). The District Court dismissed plaintiff's derivative action for failure to make pre-suit demand on the board of directors. Plaintiff timely appealed. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues on appeal.

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* The Honorable Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

Appendix A

As a threshold matter, defendants argue that this appeal is moot. Plaintiff responds that this claim falls under an exception to the mootness doctrine because it seeks relief for a wrong that is "capable of repetition, yet evading review." *Heldman on Behalf of T.H. v. Sobol*, 962 F.2d 148, 157 n. 9 (2d Cir.1992); *see also Honig v. Doe*, 484 U.S. 305, 322-23, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988) (recognizing an exception to the mootness doctrine upon finding a "sufficient likelihood that [plaintiff] will again be wronged in a similar way, and that any resulting claim [plaintiff] may have for relief will surely evade . . . review" (internal quotation marks and citation omitted)); *Seibert v. Sperry Rand Corp.*, 586 F.2d 949, 951 (2d Cir.1978) (recognizing an exception to the mootness doctrine for a wrong capable of recurrence yet evading review). While we recognize that the particular SEC regulation at issue in plaintiff's claims is no longer in effect, the underlying alleged wrongful conduct—providing misleading calculations in proxy statements under section 14—is a wrong that is "capable of repetition, yet evading review." *Heldman*, 962 F.2d at 157 n. 9. Plaintiff's appeal is, therefore, not moot.

On appeal plaintiff argues that (1) there is no pre-suit demand requirement for shareholder derivative suits under section 14 of the 1934 Act because proxy misstatements are not a product of business judgment, and (2) accordingly, demand was excused in the instant case because this proxy misstatement was not a product of the valid exercise of business judgment, and (3) in the alternative, demand was excused in this particular

action as futile because the directors were either interested or not independent. Defendants respond that section 14 suits are not generally exempt from a demand requirement, and that plaintiff was not excused on either ground for failing to meet that requirement before bringing his derivative suit so the District Court properly dismissed plaintiff's suit. For the reasons stated below, we affirm the District Court's dismissal of plaintiff's suit.

Plaintiff bases both grounds for excusing demand on *Aronson v. Lewis*, a Delaware case which provides that demand should be excused when a reasonable doubt is created that (1) the directors are disinterested and independent or (2) the challenged transaction was otherwise the product of a valid exercise of business judgment. 473 A.2d 805, 812 (Del.1984), *overruled on other grounds by Brehn v. Eisner*, 746 A.2d 244 (Del. 2000).

No clear rule has emerged from the district courts that have addressed this issue, and we do not find the need to set forth a bright-line rule at present, as demand under *Aronson* is an inquiry *specific to the challenged transaction.* We therefore decline plaintiff's invitation to create a blanket rule under the second prong of *Aronson* declaring that demand is generally not required in a shareholder derivative suit alleging violations of section 14 of the 1934 Act.

Plaintiff further contends that because the SEC regulation at issue here required "full disclosure,"

the proxy statement disclosure was not a matter of business judgment so that demand should be excused. We disagree. The particular disclosure at issue on this appeal was a business judgment. The directors had a legal obligation to disclose *either* the potential realizable value of stock options granted to officers *or* the present value of the stock options granted. The regulations further provided that if the proxy statement disclosed the present value, it could be calculated under "*any* option pricing model." 17 C.F.R § 229.402(c)(2)(vi) (Apr. 1, 2006) (emphasis added). The information required to be disclosed could not have been done automatically or without thought. Rather, determining which figure to disclose and which pricing model to apply required discretion and an exercise of business judgment.

Where, as here, directors must use valid business judgment to meet their obligations under section 14, the demand requirement for a derivative shareholder suit cannot be excused. The demand requirement "affords the directors an opportunity to exercise their reasonable business judgment" by upholding the fundamental concept that directors manage the business and affairs of a corporation. *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 533, 104 S.Ct. 831, 78 L.Ed.2d 645 (1984). Although we can anticipate a situation in which demand would be futile, and thus excused under the second prong of *Aronson*, in a section 14 derivative suit, that is not the case here. We agree with the District Court that demand was necessary here and was therefore not excused.

Plaintiff also argues that he was excused from the demand requirement under the first prong of *Aronson* because a majority of the directors were either interested or not independent. As Judge Townes stated in her thoughtful and comprehensive opinion, plaintiff's "complaint[,] [even if amended, would] not create a reasonable doubt that the majority of the directors are disinterested and independent, and therefore fails to establish that it would have been futile to make demand upon Goldman's Board of Directors prior to commencing this action." SPA 17 (Order of Dec. 18, 2008).

We have considered plaintiff's other arguments and find them to be without merit.

CONCLUSION

In sum, we hold that demand was not excused for plaintiff's suit under section 14 of the 1934 Act, and because plaintiff failed to make a demand prior to commencing this action, his claim must be dismissed.

Accordingly, we AFFIRM the judgment of the District Court.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED DECEMBER 19, 2008

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 07-CV-1130 (SLT)(JMA)

JEFFREY W. BADER,

Plaintiff,

v.

LLOYD C. BLANKFEIN, *et al.*,

Defendants.

Dec. 19, 2008

MEMORANDUM and ORDER

TOWNES, District Judge.

Plaintiff Jeffrey W. Bader, brings this derivative action on behalf of Goldman Sachs Group, Inc. ("Goldman" or the "Corporation"), a Delaware corporation traded on the New York Stock Exchange ("NYSE"), alleging that defendants violated Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C.

§ 78n(a), and Delaware state law by filing a proxy statement on February 21, 2007 (the "2007 Proxy Statement") that contained false and misleading information. Plaintiff's complaint alleges that the 2007 Proxy Statement, which asked the shareholders to vote on the Corporation's Board of Directors, misstated the "grant date present values" of stock options which had been granted to three directors and two other highly compensated employees in Fiscal Year 2006, thus misleading the stockholders as to the enormity of the compensation packages bestowed upon these individuals.

Defendants now move to dismiss this action, arguing, *inter alia*, that plaintiff failed to make a demand on Goldman's Board of Directors prior to commencing this action. Plaintiff concedes that he did not make such a demand, but argues (1) that no such demand is necessary in § 14(a) actions and (2) that such a demand would have been futile because of a majority of the Corporation's directors were not disinterested and independent. For the reasons set forth below, this Court concludes that a demand was necessary and was not futile, and that this action must, therefore, be dismissed due to plaintiff's failure to satisfy the "demand requirement," a precondition for bringing this action.

Appendix B

BACKGROUND

Goldman, a Delaware corporation, is a global investment banking and securities firm, headquartered in New York City. *See* http:// www2.goldmansachs.com/ s/prospectus/Prospectus Summary.html. At all times relevant to this action, its Board of Directors consisted of thirteen members, each elected annually for a one-year term. Three of these directors-defendants Lloyd C. Blankfein, Gary D. Cohn, and Jon Winkelried (collectively, the "Employee Directors")—are officers of Goldman; Mr. Blankfein is Chairman of the Board and Chief Executive Officer, while Messrs. Cohn and Winkelried are both presidents of the Corporation and co-Chief Operating Officers (Complaint at ¶¶ 19-21). The other ten directors are "independent," insofar as they have been determined by Goldman's Board of Directors not to have any direct or indirect material relationship with Goldman. *See* http:// www2.goldmansachs.com /our-firm/corporate-governance/corporate-governanc e-documents/policy-regarding-director-independence-determ.pdf. At the time this action was commenced in March 2007, the independent directors were defendants John Browne (also known as Lord Browne of Madingley), John H. Bryan, Claes Dahlbäck, Stephen Friedman, William W. George, Rajat K. Gupta, James A. Johnson, Lois D. Juliber, Edward M. Liddy and Ruth J. Simmons. *See* Complaint at ¶¶ 8-17.

On February 21, 2007—approximately one month prior to the 2007 Annual Meeting of its shareholders—Goldman filed the 2007 Proxy Statement, which asked

the shareholders to vote, *inter alia*, to re-elect all thirteen directors for year-long terms expiring at the 2008 shareholders' meeting. The 2007 Proxy Statement was prepared in accordance with Schedule 14-A, 17 C.F.R. § 240.14a-101, which prescribes the information that must be included in a proxy statement. Item 8 of Schedule 14-A provides that, if a proxy statement solicits action with regard to the election of directors, the proxy statement must include "the information required by Item 402 of Regulation S-K." Item 402, which is set forth at 17 C.F.R. § 229.402, mandates the disclosure of specific information relating to executive compensation.

Among the disclosures mandated by Item 402 is information concerning stock options which have been granted by the corporation to the chief executive officer of the corporation and the other four most highly compensated executive officers during the preceding fiscal year. At the time the 2007 Proxy Statement was issued, Item 402(c)(2) dictated that this stock option information be presented in a table, listing, *inter alia*, the number of securities underlying the options granted, the percentage that each grant represents of all options granted to employees during that fiscal year, the per-share exercise or base price of the options and the expiration dates of the options. 17 C.F.R. § 229.402(c)(2)(ii)-(v). Item 402(c)(2)(vi) further required that the table include information concerning the value of the options, but provided two alternatives for supplying this information. Under the first alternative, the table had to include at least two additional columns stating

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"[t]he potential realizable value of each grant of options . . . , assuming that the market price of the underlying security appreciates in value from the date of grant to the end of the option . . . at the . . . annualized rates [of] 5% . . . [and] 10% . . . ." 17 C.F.R. § 229.402(c)(2)(vi)(A).[1] Under the second alternative, the table had to include the "grant date present value" of the options—that is, "[t]he present value of the grant at the date of grant." 17 C.F.R. § 229.402(c)(2)(vi) (B).

There are several option pricing models that can be used to calculate "grant date present value," including the Black-Scholes model and the binomial option pricing model.[2] Item 402(c)(2) (vi)(B) expressly provided that any option pricing model could be utilized. However, the Instructions to Item 402(c)(2) required that the table providing the stock option information include a footnote "describ[ing] the valuation method used" to derive the "grant date present value." Instructions to Item 402(c)(2) at ¶ 9. In addition, the Instructions to Item 402(c)(2) provided:

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1. If the exercise or base price was below the market price of the underlying security at the date the option was granted, the table had to include a third "column labeled 0%, to show the value at grant-date market price." 17 C.F.R. § 229.402(c)(2)(vi)(A)(3).

2. The Black-Scholes model-the only model relevant to this case-calculates "a theoretical call price (ignoring dividends paid during the life of the option) using the five key determinants of an option's price: stock price, strike price, volatility, time to expiration, and short-term (risk free) interest rate." *See* http://www.hoadley.net/options/bs.htm.

Appendix B

> Where the registrant has used a variation of the Black-Scholes or binomial option pricing model, the description shall identify the use of such pricing model and describe the assumptions used relating to the expected volatility, risk-free rate of return, dividend yield and time of exercise. Any adjustments for non-transferability or risk of forfeiture also shall be disclosed.

In preparing the 2007 Proxy Statement, Goldman elected to provide the "grant date present value" of stock options granted to CEO Blankfein and its four other most highly compensated executive officers: Presidents Cohn and Winkelried, Vice Chairman John S. Weinberg and Executive Vice President David A. Viniar. As required by the instructions to Item 402(c)(2), the 2007 Proxy Statement included a footnote which stated that the "grant date present value" was "based on *a* Black-Scholes option pricing model." 2007 Proxy Statement (attached as Ex. 1 to Declaration of David M.J. Rein, Esq., dated July 20, 2007) at 17, fn. (b)) (emphasis added). The footnote then described the assumptions used as follows:

> The exercise price of each Option ($199.84) is equal to the closing price-per-share of Common Stock on the NYSE on December 15, 2006, the date the Options were granted. The *primary* inputs to the Option valuation model were: 27.5% volatility; 4.6% risk-free rate of return; 0.7% dividend yield; and 7.5

> year expected life, which reflects the sales restrictions on the underlying shares that apply until January 2011. The values of Options described above are hypothetical and have been provided solely to comply with the rules of the SEC. The actual value, if any, that will be realized upon the exercise of an Option will depend upon the difference between the exercise price of the Option and the market price of the Common Stock on the date that the Option is exercised.

Id. (emphasis added). Although the terms in the footnote which this Court has italicized at least suggested that Goldman was using a variant of the original Black-Scholes model, the footnote did not describe the variation and made no mention of any adjustments to the model for non-transferability or risk of forfeiture.

On March 16, 2007, a Goldman stockholder, plaintiff Jeffrey W. Bader, commenced this derivative action pursuant to section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), and Delaware state law, principally alleging that the "grant date present values" set forth in the 2007 Proxy Statement were "materially false." Complaint at ¶ 39.[3] Using the assumptions set

3. Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), makes it unlawful to solicit a proxy "in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe . . . . ." One such rule-Rule 14a-9, 17 C.F.R. § 240.14a-9-prohibits solicitation of a

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forth in the 2007 Proxy Statement at page 17, footnote (b), plaintiff calculates the "correct Black-Scholes Value[s]" of the options as being approximately 50% greater than the values reported in the proxy statement. *Id.* For example, plaintiff calculates that the correct grant date present value of stock options granted to CEO Blankfein in the 2006 fiscal year was $15,915,974, not $10,453,031 as stated in the 2007 Proxy Statement. *Id.* Similarly, the 2007 Proxy Statement lists the grant date present value of options granted to Presidents Cohn and Winkelried in fiscal year 2006 as $10,253,191, while plaintiff calculates that the correct value is $15,611,694. *Id.* Plaintiff alleges that "[t]hese differences are material because of the sizes of the amounts and because these values are expressly and affirmatively required by statute and regulation." *Id.*

Plaintiff's complaint further alleges that these miscalculations—which plaintiff attributes to "negligence" on the part of the directors and defendants Viniar and Weinberg (Complaint at ¶ 51)—caused other information in the 2007 Proxy Statement and Goldman's other SEC filings to be materially false. Plaintiff claims that, because Goldman underestimated the grant date present value of CEO Blankfein's stock options by $5,462,943, page 26 of the 2007 Proxy Statement falsely reports Mr. Blankfein's total compensation for Fiscal

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(Cont'd)

proxy by means of a proxy statement that is "false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading. . . ."

Year 2006 as a mere $54,723.364—not $60,186,307. Complaint at ¶ 40. Plaintiff claims that this same error caused Goldman to misreport Mr. Blankfein's compensation in another SEC filing: Form 10-K.

Plaintiff also finds fault with that portion of the 2007 Proxy Statement in which Goldman's Compensation Committee reports that it "engaged outside consultants to assist it with benchmarking and analyses with respect to executive compensation and benefit practices and design," 2007 Proxy Statement at 21, and that the Committee "relied on a survey prepared by consultants regarding compensation levels in 2005 for certain of the most highly compensated employees" at similar institutions, such as Lehman Brothers Holdings, Inc., Morgan Stanley, Merrill Lynch & Co., Inc., Citigroup Inc., and J.P. Morgan Chase & Co. *Id.* at 23. Plaintiff claims that these statements "represent[ ] that [Goldman's] executive pay is within the range of the executive pay at the comparable companies" when, in reality, it is so much higher "as to shock the conscience." Complaint at ¶ 46.

Defendants now move to dismiss the complaint on various grounds, including the ground that plaintiff failed to make a pre-suit demand that the Goldman Board of Directors themselves bring this suit on behalf of the Corporation. In his complaint, plaintiff concedes that he never "made any demand on . . . [Goldman's] board of directors to institute this action against the individual defendants." *Id.* at ¶ 26. However, plaintiff's complaint alleges that no such demand was necessary

because acts in violation of § 14(a) are "not the product of a valid exercise of business judgment," which the demand requirement was created to protect. *Id.* at ¶ 30. In addition, the complaint alleges that plaintiff's failure to make such a demand should be excused because a majority of the Goldman directors were not "disinterested and independent," for reasons discussed below.

DISCUSSION

The Demand Requirement

As plaintiff's complaint expressly states, this is a derivative action, brought by a shareholder "in the right of and for the benefit of" a corporation. Complaint at ¶ 3. Derivative actions have their origins in equity. They were devised in the early 19th century to address the "possibilities for abuse" arising from the fact that stockholders could not "call corporate managers to account in actions at law." *Ross v. Bernhard*, 396 U.S. 531, 534, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970). The derivative action, which "permits an individual shareholder to bring suit to enforce a corporate cause of action against officers, directors, and third parties," curbed these abuses by giving shareholders a mechanism to "protect the interests of the corporation from the misfeasance and malfeasance of faithless directors and managers." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991) (internal quotations and emphasis omitted).

The remedy itself, however, provided opportunities for abuse by enabling private shareholders to bring so-called "strike suits"—actions "brought not to redress real wrongs, but to realize upon their nuisance value." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). "Concerned about the potential for abuse of the remedy . . . , equity courts established as a precondition for . . . [a derivative action] that the shareholder demonstrate that the corporation itself had refused to proceed after suitable demand, unless excused by extraordinary conditions." *Scalisi v. Fund Asset Mgmt. L.P.*, 380 F.3d 133, 138 (2d Cir.2004) (internal quotations omitted); *see Hawes v. City of Oakland*, 104 U.S. 450, 460, 26 L.Ed. 827 (1882). These preconditions were subsequently incorporated into various Equity Rules, then into Rule 23(b) of the Federal Rules of Civil Procedure, and are now included in Fed.R.Civ.P. 23. 1.[4] *See Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 530, n. 5, 104 S.Ct. 831, 78 L.Ed.2d 645 (1984); *Ross*, 396 U.S. at 534, n. 4.

Notwithstanding its incorporation into the Federal Rules of Civil Procedure, "the function of the demand doctrine in delimiting the respective powers of the individual shareholder and of the directors to control

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4. Rule 23.1 provides, in pertinent part, that a derivative complaint must "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort."

corporate litigation clearly is a matter of 'substance,' not 'procedure.' " *Kamen*, 500 U.S. at 96-97. The "demand requirement" upholds the fundamental precept that directors manage the business and affairs of the corporation by "afford[ing] the directors an opportunity to exercise their reasonable business judgment" in determining whether and how to pursue the proposed litigation. *Daily Income Fund*, 464 U.S. at 533. In addition, the "demand requirement" promotes alternative dispute resolution by permitting the directors to fashion a solution that avoids litigation altogether. As the Second Circuit has noted:

> Permitting corporations to assume control over shareholder derivative suits ... has numerous practical advantages. Corporate management may be in a better position to pursue alternative remedies, resolving grievances without burdensome and expensive litigation. Deference to directors' judgments may also result in the termination of meritless actions brought solely for their settlement or harassment value. Moreover, where litigation is appropriate, the derivative corporation will often be in a better position to bring or assume the suit because of superior financial resources and knowledge of the challenged transactions.

Lewis v. Graves, 701 F.2d 245, 247-48 (2d Cir.1983) (internal citations omitted).

Appendix B

In light of the history and purpose of the demand requirement, the basis for the derivative action brought by the shareholder is irrelevant. After all, a "strike suit" can be based on technical violations of any of a number of statutes. Regardless of the statutory basis, the corporate directors must be given the opportunity to exercise their "reasonable business judgment" and to determine not only whether a potential derivative plaintiff's demand has merit, but also whether an action or omission giving rise to a meritorious claim is best remedied through litigation or some alternative means.

Plaintiff's Claim That the Demand Requirement Does Not Apply in this Case

The plaintiff in this case, however, urges this Court to rule that the "demand requirement" is inapplicable if the shareholder derivative action alleges only a violation of section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a). Plaintiff's argument is principally based on *Vides v. Amelio*, 265 F.Supp.2d 273 (S.D.N.Y.2003), in which Judge Stanton held that, "under Delaware law and federal policy, there is no need for prior demand upon the board of directors with respect to the claim of misstatements and omissions in . . . [a] proxy statement." *Id.* at 276. However, for the reasons explained below, this Court declines to follow *Vides*.

In *Vides*, the plaintiffs—like plaintiff herein—brought a derivative action pursuant to section 14(a) of the Securities Exchange Act of 1934 and Rule 14a-9, alleging that information contained in a corporation's

proxy statement was false and misleading. Defendants moved to dismiss the complaint, arguing, *inter alia*, that the plaintiffs had failed to make a pre-suit demand upon the corporation's board of directors. Judge Stanton declined to dismiss the derivative action on this basis. He reasoned that while the "demand requirement" might ordinarily be necessary to afford corporate directors the opportunity to exercise their reasonable business judgment, demand was unnecessary in § 14(a) cases because no "business judgment" was involved in deciding whether to include certain information in a proxy statement. Rather, the decision concerning whether to include information in a proxy statement was entirely a legal one—*i.e.*, whether that information was material.

Although Judge Stanton may have been correct in observing that the decision of whether to include information in a proxy statement does not require an exercise of business judgment, he ignored the fact that directors must still use their business judgment in deciding what course of action to take when alerted to a materially false statement in a corporate proxy statement. Under such circumstances, the directors must do more than simply engage in a legalistic determination of whether the defects are material; they must also decide whether litigation is the best avenue to rectify the problem. If shareholders could elect to sue on behalf of a corporation without consulting the board of directors whenever they deemed a proxy statement to contain materially false information, shareholders could effectively usurp the board's decision

as to whether litigation was merited. The "demand requirement" permits the board, in the exercise of its business judgment, to choose forms of "alternate dispute resolution," and thereby upholds "the fundamental precept that directors manage the business and affairs of corporations." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del.1984), *overruled on other grounds, Brehm v. Eisner*, 746 A.2d 244 (Del.2000).

The opinions on which *Vides* principally relied—*Galef v. J.A. Alexander*, 615 F.2d 51 (2d Cir.1980), *In re Anderson, Clayton Shareholders' Litig.*, 519 A.2d 669 (Del.Ch.1986), and the unpublished *In re Tri-Star Pictures, Inc. Litig.*, Civ. A. No. 9477, 1990 WL 82734 (Del.Ch. June 14, 1990)—do not support the conclusion that the demand requirement does not apply to § 14(a) cases. These three cases relate to the "business judgment rule"—a doctrine that "bars judicial inquiry into actions of directors taken in good faith and in honest pursuit of the legitimate purposes of the corporation." *Galef*, 615 F.2d at 57. Those portions of the cases quoted by Judge Stanton support the proposition that the business judgment rule cannot be interposed as a bar to actions alleging misrepresentations or omissions in proxy statements. However, none of those cases can be read as excusing a shareholder from making a demand upon the corporate board before commencing a derivative action alleging a violation of section 14(a).

This Court is not alone in rejecting Judge Stanton's reasoning with respect to this issue. In the five and one-half years since *Vides* was decided, no fewer than five

other district courts have expressly refused to follow it. *See Risberg ex rel. Aspen Tech., Inc. v. McArdle*, 529 F.Supp.2d 213, 225-26 (D.Mass.2008); *In re CNET Networks, Inc. Shareholder Derivative Litig.*, 483 F.Supp.2d 947, 966 (N.D.Cal.2007); *In re F5 Networks, Inc. Derivative Litig.*, Master File No. C06-794RSL, 2007 WL 2476278, at * 14 (W.D.Wash. Aug.6, 2007); *In re Computer Sciences Corp. Derivative Litig.*, Lead No. CV 06-05288 MRP (Ex), 2007 WL 1321715, at * 4, n. 4 (C.D.Cal. Mar. 26, 2007); *St. Clair Shores Gen. Employees Ret. Sys. v. Eibeler*, No. 06 Civ. 688(SWK), 2006 WL 2849783, at *4-*5 (S.D.N.Y. Oct.4, 2006). While *Vides* has been cited by two other courts—*Benzon v. Morgan Stanley Distributors, Inc.*, No. 3:03-0159, 2004 WL 62747, at *4 (M.D.Tenn. Jan.8, 2004), and *In re Elan Corp. Sec. Litig.*, No. 02 Civ. 865(RMB)(FM), 2004 WL 1305845, at *16 (S.D.N.Y. May 18, 2004) (Report and Recommendation of Maas, M.J.)—neither of these courts has followed *Vides* for the proposition that demand is not required in § 14(a) actions. In addition, other courts (including the Second Circuit) which have not specifically considered *Vides* or this particular issue, have dismissed § 14(a) claims for failure to make a demand on the board. *See, e.g., Lewis*, 701 F.2d at 247-50; *In re IAC/InterActiveCorp Sec. Litig.*, 478 F.Supp.2d 574, 606, n. 17 (S.D.N.Y.2007).

Plaintiff's Claim That Demand Would Have Been Futile

Although this Court concludes that the "demand requirement" applies to this case, this Court also recognizes that "demand may be excused where a

shareholder is able to show that demand would be futile." *Scalisi*, 380 F.3d at 138. "The specifics of what constitutes futility vary from state to state." *Id.* (citing 13 William Meade Fletcher *et al.*, *Fletcher Cyclopedia of the Law of Private Corporations* § 5965 (perm. ed. rev.vol.2004)). Accordingly, "[t]he substantive law which determines whether demand is, in fact, futile is provided by the state of incorporation of the entity on whose behalf the plaintiff is seeking relief." *Id.* (citing *Kamen*, 500 U.S. at 108-09).

Since Goldman is incorporated in the State of Delaware, this Court must apply Delaware law to determine whether demand was futile in this case. In Delaware, the test for determining whether the "demand requirement" should be excused as futile is "whether, under the particularized facts alleged, a reasonable doubt is created that: (1) the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." *Rales v. Blasband*, 634 A.2d 927, 933 (Del.1993) (quoting *Aronson*, 437 A.2d at 814). The second method of establishing futility is unavailable, however, in cases "where the board that would be considering the demand did not make a business decision which is being challenged in the derivative suit." *Id.* at 933-34.

In order to allege facts creating reasonable doubt as to whether "the directors are disinterested and independent," a plaintiff need not allege facts showing that each director is neither interested nor independent.

Rather, a plaintiff must show that a *majority* of the directors is either interested or not independent. *See, e.g., In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 363 (Del.Ch.2008) (quoting *Orman v. Cullman*, 794 A.2d 5, 22 (Del.Ch.2002)). Under Delaware law, "[a] director is considered interested where he or she will receive a personal financial benefit from a transaction that is not equally shared by the stockholders." *Rales*, 634 A.2d at 936 (Del.1993) (citing *Aronson*, 437 A.2d at 814). A director may also be "interested" if "a corporate decision will have a materially detrimental impact on a director, but not on the corporation and the stockholders." *Id.* A director is "independent" if his or her decision "is based on the corporate merits of the subject before the board rather than extraneous considerations or influences." *Aronson*, 437 A.2d at 816.

In this case, plaintiff does not allege that Goldman's Board of Directors was involved in preparing or reviewing the 2007 Proxy Statement, or that the Board made any business decision regarding the calculation or reporting of the "grant date present value" of the executives' stock options. Rather, plaintiff alleges that the directors could not have impartially considered plaintiff's demand for various reasons. First, plaintiff's complaint alleges that the Employee Directors "are interested in the material understatement of their option grants and total compensation because it creates the illusion that they are more compliant with their statutory and fiduciary duties of disclosure and their fiduciary duties not to accept excessive compensation" and are "financially interested in receiving more

compensation." Complaint at ¶ 27. Second, the complaint states that two "independent" directors, Messrs. Dahlbäck and Friedman, are both interested and lack independence because Goldman has invested $600 million in entities to which Mr. Dahlbäck serves as a adviser, and has invested $670 million in Funds managed by Mr. Friedman. *Id.* at ¶¶ 10-11, 28. Third, the complaint alleges that Mr. Friedman and five other "independent" directors—Ms. Simmons, Lord Browne, and Messrs. Gupta, Liddy, and Bryan—are interested and lack independence because they sit on the boards of directors of various nonprofit organizations and have "been assisted in their fund raising responsibilities by the [Goldman Sachs] Foundation, which is funded by [Goldman]," or (in the case of Mr. Bryan) by Goldman itself. *Id.* at ¶¶ 8-9, 11, 13, 16-17, 28. Finally, the complaint states that all thirteen directors are neither disinterested nor independent "since every member of the board is liable for the material misstatements and omissions in the Proxy Statement," *id.* at ¶ 30(d), and because the directors "sought to entrench themselves." *Id.* at ¶ 30(e).

It is most efficient to analyze plaintiff's allegations of futility in reverse order, beginning with the claim that all thirteen directors are interested or lack independence because they were involved in the wrongdoing which is the subject of this litigation. Although this argument is entirely logical, Delaware and federal courts alike have long held "claims of directorial participation in and liability for the wrongs alleged, coupled with a reluctance by directors to sue

themselves," inadequate to establish futility. *See, e.g., Pogostin v. Rice*, 480 A.2d 619, 625 (Del.1984), *overruled on other grounds, Brehm v. Eisner*, 746 A.2d 244 (Del.2000); *Aronson*, 473 A.2d at 815, 818; *Graves*, 701 F.2d at 248-49. The *Graves* Court succinctly explained the rationale for rejecting this argument as follows:

> To construe [this argument] as sufficient [to establish futility] would mean that plaintiffs could readily circumvent the demand requirement merely by naming as defendants all members of the derivative corporation's board. Permitting plaintiffs to employ this tactic would eviscerate Rule 23. 1, a rule that this Court has vigorously enforced.

701 F.2d at 249.

Similarly, plaintiff's claims of "entrenchment" lack sufficient specificity since they do not allege that "the board members' prospects of remaining in office were ever in serious doubt" or would have been in doubt had the alleged misstatements in the 2007 Proxy Statement been revealed to shareholders. *See In re Morgan Stanley Derivative Litig.*, 542 F.Supp.2d 317, 323 (S.D.N.Y.2008), *see also Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 175 (Del.Ch.2005) (a plaintiff asserting entrenchment as a basis for demand futility "must prove that the directors believed they were vulnerable to being removed from office, and that they took entrenchment action."). In fact, the 2007 Proxy Statement indicates that all thirteen directors were

running for re-election unopposed. 2007 Proxy Statement at 12, 60 (stating that "shareholders will be asked to elect the thirteen nominees set forth below" and that "[a]ll of the nominees currently are members of the Board of Directors . . . ."). Since every member of the board was unopposed in his or her bid for re-election and the complaint contains no other allegations regarding the directors' entrenchment, there is no basis for excusing demand on this basis. *See In re Morgan Stanley Derivative Litig.*, 542 F.Supp.2d at 323 (citing *Graves*, 701 F.2d at 250).

his Court turns next to plaintiff's argument that some of the supposedly "independent" directors were not actually independent because a Goldman-funded non-profit organization—The Goldman Sachs Foundation, Inc. (the "Foundation")—has made charitable contributions to organizations with which these directors were affiliated.[5] For these allegations to

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5. For example, plaintiff's complaint alleges:

1. The Foundation "pledged funding in an undisclosed amount to share in the support of a position of Program Director at The Swearer Center for Public Service at Brown University," where Ms. Simmons serves as president (Complaint at ¶ 17);

2. The Foundation has, since 2002, donated $380,000 to the London School of Economics and Political Science and $3.5 million to the Tsinghua University School of Economics and Management in Beijing, China-two institutions where Lord Browne sits on

(Cont'd)

be relevant to the issue of director independence, plaintiffs must allege that Goldman had "he unilateral power . . . to decide whether the challenged director continues to receive a benefit. . . ." *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust ex rel. Fed. Nat'l Mortgage Ass'n v. Raines*, 534 F.3d 779, 794 (D.C.Cir.2008) (quoting *Orman*, 794 A.2d at 25, n. 50). Absent such allegations, "contributions to non-profit charities and organizations provide no basis . . . to question the independence of the directors for purposes of Delaware law." *See id.*

(Cont'd)

> an "advisory board." In addition, the Foundation donated $500,000 to the Stanford Educational Leadership Institute in 2005, when Lord Browne was "chairman emeritus of the advisory board of the Stanford University Graduate School of Business" (Complaint at ¶ 8);
>
> 3. The Foundation has, since 2002, donated $1.6 million to the Indian School of Business in Hyderabad, India, where Mr. Gupta is chairman of the board, and $3.5 million to the Tsinghua University School of Economics and Management in Beijing, China, where Mr. Gupta-like Lord Browne-sits on the dean's advisory board. In addition, the Foundation has donated $1,665,000 to the Model UN program, and Mr. Gupta is a member of the United Nations Commission on the Private Sector and Development (Complaint at ¶ 13);
>
> 4. The Foundation has, since 2003, donated $190,000 to clubs and programs supported by the Boys and Girls Clubs of America, an organization of which Mr. Liddy serves as chairman (Complaint at ¶ 16).

Appendix B

Plaintiff's complaint does not allege that Goldman's executives have the power to decide whether the Foundation will continue to fund the charities and non-profit organizations with which the Goldman directors are affiliated. Indeed, it seems doubtful that plaintiff could make such an allegation, since the Foundation has its own independent board of directors. *See* http://www2.goldmansachs.com /citizenship/philanthropy/publications-andresources/gsf-annual-reports/2006-annual-report.pdf.

Plaintiff's complaint also questions the independence of another "independent" director—John H. Bryan—alleging that Goldman itself made "substantial contributions" to a campaign chaired by Mr. Bryan, which sought to raise $100 million to renovate the Chicago Lyric Opera House and Orchestra Hall. Complaint at ¶ 9. While Goldman may have, at some point, been able to withdraw its support for this campaign, it seems highly unlikely that Goldman still could have done so in 2006. The $100 million renovation to the Opera House was completed in 1996. *See* http://www.lyricopera.org/about/house.asp.

Plaintiff's remaining arguments relate to only five of the thirteen directors. Since plaintiff must show that a *majority* of the directors—*i.e.*, at least seven of the thirteen—are either interested or not independent, *see, e.g., In re Transkaryotic Therapies, Inc.*, 954 A.2d at 363;*Orman*, 794 A.2d at 22, there is no reason for this Court to consider plaintiff's remaining arguments. Plaintiff's complaint does not create a reasonable doubt

that the majority of the directors are disinterested and independent, and therefore fails to establish that it would have been futile to make a demand upon Goldman's Board of Directors prior to commencing this action.

CONCLUSION

For the reasons stated above, the instant derivative action is dismissed due to plaintiff's failure to make a demand upon the Board of Directors of Goldman Sachs Group Inc. prior to commencing this action. The Clerk of Court is directed to enter judgment in favor of defendants and to close this case.

SO ORDERED.

APPENDIX C — REGULATIONS AND RULE INVOLVED

SCHEDULE 14A, 17 C.F.R. § 240.14a-9

Item 8. Compensation of directors and executive officers.

Furnish the information required by Item 402 of Regulation S-K (§ 229.402 of this chapter) and paragraphs (e)(4) and (e)(5) of Item 407 of Regulation S-K (§ 229.407(e)(4) and (e)(5) of this chapter) if action is to be taken with regard to:

(a) The election of directors;

* * * *

Appendix C

Regulation S-K, 17 C.F.R. § 229.402, Item 402(c)
(Apr. 1, 2006 Edition)

(c) Option/SAR Grants Table.

(1) The information specified in paragraph (c)(2) of this Item, concerning individual grants of stock options (whether or not in tandem with SARs) and freestanding SARs (including options and SARs that subsequently have been transferred) made during the last completed fiscal year to each of the named executive officers shall be provided in the tabular format specified as follows:

(2) The Table shall include, with respect to each grant:

(i) The name of the executive officer (column (a));

(ii) Number of securities underlying option/SARs granted (column (b));

(iii) The percent the grant represents of total options and SARs granted to employees during the fiscal year(column (c));

(iv) The per-share exercise or base price of the options or SARs granted (column (d)). If such exercise or base price is less than the market price of the underlying security on the date of grant, a separate, adjoining column shall be added showing market price on the date of grant;

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(v) The expiration date of the options or SARs (column (e)); and

(vi) Either (A) the potential realizable value of each grant of options or freestanding SARs or (B) the present value of each grant, as follows:

(A) The potential realizable value of each grant of options or freestanding SARs, assuming that the market price of the underlying security appreciates in value form the date of grant to the end of the option or SAR term, at the following annualized rates:

(*1*) 5% (column (f));

(*2*) 10% (column (g)); and

(*3*) If the exercise or base price was below the market price of the underlying security at the date of grant, provide an additional column labeled 0%, to show the value at grant-date market price; or

(B) The present value of the grant at the date of grant, under any option pricing model (alternative column (f)).

Appendix C

Instructions to Item 402(c):

9. Where the registrant chooses to use the grant-date valuation alternative specified in paragraph (c)(2)(vi)(B) of this item, the valuation shall be footnoted to describe the valuation method used. Where the registrant has used a variation of the Black-Scholes or binomial option pricing model, the description shall identify the use of such pricing model and describe the assumptions used relating to the expected volatility, risk-free rate of return, dividend yield and time of exercise. Any adjustments for non-transferability or risk of forfeiture also shall be disclosed. In the event another valuation method is used, the registrant is required to describe the methodology as well as any material assumptions.

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Rule 14a-9, § 240.14a-9 False or misleading statements.

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

(b) The fact that a proxy statement, form of proxy or other soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made.

Appendix C

Note: The following are some examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of this section.

(a) Predictions as to specific future market values.

(b) Material which directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes charges concerning improper, illegal or immoral conduct or associations, without factual foundation.

(c) Failure to so identify a proxy statement, form of proxy and other soliciting material as to clearly distinguish it from the soliciting material of any other person or persons soliciting for the same meeting or subject matter.

(d) Claims made prior to a meeting regarding the results of a solicitation.